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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JUAN RAMON MATTA-BALLESTEROS,

Petitioner,

vs.

GARY L. HENMAN, Warden, United States Penitentiary, Marion, Illinois,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. May officers or agents of the United States engage in torture on foreign soil? If not, may a suspect tortured abroad and thereafter forcibly brought to this country nevertheless be held for trial in this country?

2. Does international law prohibit kidnaping from abroad by or on behalf of the United States of a suspect accused of crime in this country?

3. Does the Constitution prohibit kidnaping from abroad by or on behalf of the United States of a suspect accused of crime in this country?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Juan Ramon Matta-Ballesteros and the respondent, Gary L. Henman, Warden of the United States Penitentiary at Marion, Illinois.

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No.

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GARY L. HENMAN, Warden, United States Penitentiary, Marion, Illinois,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Juan Ramon Matta-Ballesteros, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled proceeding on February 21, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit has not been reported. It is reproduced in the appendix hereto.

The opinion of the United States District Court for the Southern District of Illinois is reported at 697 F. Supp. 1040 (S.D.Ill., 1988) and is reproduced in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.§ 1254(1).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

United States Constitution: Amendement V
(U.S.C.A. Const. Amend V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Article VI Clause 2.
(U.S.C.A. Const. Article VI)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

1909 Extradition Treaty Between the United States and Honduras
(37 Stat 1616, 45 Stat 2489)

Article VIII

Under the stipulations of this Convention, neither of the Contracting Parties shall be bound to deliver up its own citizens.

Article XI

Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the Contracting Parties. . .

It shall be competent for such diplomatic or superior consular officers to ask and obtain a mandate or preliminary warrant of arrest for the person whose surrender is sought, where upon the judges and magistrates of the two governments shall respectively have power and authority, upon complaint made under oath, to issue a warrant for the apprehension of the person charged, in order that he or she may be brought before such judge or magistrate, that the evidence of criminality may be heard and considered, and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the exaimining judge or magistrate to certify the same to the proper executive authority, that a warrant may be issued for the surrender of the fugitive.

1933 Inter-Americas Treaty
(49 Stat 3111)

Article 1

This right [of requisition] shall be claimed only under the following circumstances: (a) That the demanding state have the jurisdiction to try and to

punish the delinquency which is attributed to the individual whom it desires to extradite. (b) That the act for which extradition is sought constitutes a crime and is punishable under the laws of the demanding and surrendering states with a minimum penalty of imprisonment for one year.

Article 2

When the person whose extradition is sought is a citizen of the country to which the requisition is addressed, his delivery may or may not be made, as the legislation or circumstances of the case may, in the judgment of the surrendering State, determine. If the accused is not surrendered, the latter State is obliged to bring action against him for the crime for which he is accused, if such crime meets the conditions established in sub-article (b) of the previous article. The sentence pronounced shall be communicated to the demanding State.

Article 8

The request for extradition shall be determined in acccordance with domestic legislation of the surrendering State and the individual whose extradition is sought shall have the right to use all the remedies and resources authorized by such legislation, either before the judiciary or the administrative authorities as may be provided for by the aforesaid legislation.

Constitution of the Republic of Honduras, January, 1982

Article 102

No Honduran citizen may be extradicted nor turned over to the authorities of a foreign state.

Universal Declaration of Human Rights
(GA Res. 217 A (III), U.N. Doc. A/810 (1948))

Article 9 (Article 3)

No one shall be subjected to arbitrary arrest, detention or exile.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment.

International Covenant on Civil and Political Rights
(Dec. 16, 1966, 999 UNTS 171 reprinted in 6 ILM 368 (1967))

Article 9(1)

[N]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by laws.

STATEMENT OF THE CASE

In 1985, the United States made a formal request to the Republic of Colombia for the extradition of petitioner who had been taken into custody in that country. After the formal extradition attempt failed when appellant was returned to his native Honduras, the United States tried and failed three times during the next three years to kidnap petitioner from Honduras. No extradition request was made to the Honduran government.

Finally, on April 5, 1988, petitioner was seized at his home in Honduras by United States law enforcement agents, pushed onto the floor of a van, and hooded. The agents planted a plastic bag of white powder in the house and drove petitioner to a U.S. Air Force base in Honduras. During the hour and a half ride in the van, petitioner was beaten and burned with electric stun guns.

From Honduras, petitioner was flown to Miami, then to Puerto Rico, then to New York City, and finally to the federal penitentiary in Marion, Illinois, where twenty-four hours after his abduction, he was incarcerated. During the two hour flight from Honduras to Miami, United States agents beat and shocked him with the stunguns about the body, testicles, and feet.

Upon his arrival at Marion, petitioner was examined by medical personnel, and photographs of his body were taken. The medical records report abrasions and blisters. The photographs were submitted to the manufacturer of the electric stun gun, and the manufacturer reported that the marks on petitioner's body were consistent with wounds made by the gun. The manufacturer also reported that the United States Marshals Service carries the gun.

On April 25, 1988, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Illinois claiming that the United States had obtained jurisdiction over him by kidnapping and torture in violation of the Honduran and United States Constitutions, international law and treaty, and the supervisory power of the

Courts, and seeking petitioner's release and return to Honduras.[1] Submitted in support of the petition were the affidavit of petitioner swearing to the facts of kidnapping and torture by agents of the United States; the original authenticated testimonies of Jose Alfredo Carias Sierra, Mercedes Obdulio Posas Martinez, and Yolanda Aquilera Larios who saw the abduction and torture by civilians who were later identified to them by Honduran army officers as United States Drug Enforcement Agents; the original authenticated testimony of Felix Cerna Salgado, a Honduran Congressman, who represented that the Honduran people, public officers of the three branches of government, and civic and social organizations protested the kidnapping and that a bill denouncing it was introduced in the Honduran legislature; petitioner's medical records from the penitentiary at Marion,[2] and the report of the stun gun manufacturer.

Petitioner also referred the Court to public sources of information evidencing that the procedures used by the United States in this case were standard operating procedures and that they were directed by central governmental authorities. A factual statement by Michael Pancer, attorney for Rene Martin Verdugo-Urquidez, documented the kidnapping of Mr. Verdugo-Urquidez from Mexico in 1986. Arribel Zapata was kidnapped from Panama on May 5, 1987, and transported to the Central District of California for trial on a narcotics case. In January, 1985, Thomas Roessler and his four year old daughter were kidnapped in Baja, California, Mexico. On November 10, 1985, Angel John Zabaneh was kidnapped by United States Drug Enforcement Agents in Guatemala, tortured, and flown to Texas.

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[1] The petition was filed pursuant to 28 U.S.C. § 2241 challenging the lawfulness of his custody obtained by abduction and torture. The Seventh Circuit erroneously characterized the petition as a challenge to an underlying judgment of conviction pursuant to 28 U.S.C. § S2255. *Matta-Ballesteros v. Henman*, ____ F.2d ____, No. 88-2767, February 21, 1990, slip. op. at 5 n.4 (Appendix A, *infra*).

[2] The prison authorities refused to release the photographs, but they have since been obtained pursuant to the Freedom of Information Act.

In May, 1987, U.S. agents planned the kidnapping in Panama of Jesus Anibal Zapata. From December, 1986, through January, 1988, U.S. Marshals and other law enforcement authorities tried unsuccessfully to kidnap petitioner on four separate occasions as part of "Operation Leyende," a Washington directed international campaign to avenge the death of Drug Enforcement Agent Enrique Camarena. On June 21, 1989, according to the *New York Times* of October 14, 1989, at p.6, the Justice Department officialy notified the Federal Bureau of Investigation that it may kidnap people in foreign countries and that it may do so without consent of the foreign governments.

The United States submitted an affidavit from Juan J. Donato Morales, a Marshal, who admitted that petitioner was abducted, taken to a Marshals Service van, cuffed, hooded, and placed on his back with his hands underneath him behind his back. There were two Marshals and two Honduran officers in the van, and one of the Hondurans had a stun gun. The Marshal denied that petitioner had been abused or tortured.

On August 16, 1988, the District Court denied the writ without a hearing. It had considered the pleadings and affidavits in the light most favorable to petitioner, and held that an official Honduran government protest was necessary to effectuate petitioner's rights under the international treaties, that Fifth Amendment due process does not require a United States Court to divest itself of jurisdiction over a foreign national kidnapped and forcibly brought to the United States by United States Law enforcement agents, and that the allegations of torture of a fugitive from United States courts do not rise to the level of outrageousness necessary to come within any due process exception to United States jurisdiction.

An appeal was taken to the United States Court of Appeals for the Seventh Circuit, which, on February 21, 1990, affirmed the District Court, but held flatly that there was no due process exception to United States Courts' jurisdiction obtained by torture of a foreign national.

REASONS FOR GRANTING THE WRIT

The writ should issue to resolve Circuit Court conflict over whether international law and treaty, Article VI of the United States Constitution, Fifth Amendment due process, and the Court's supervisory power require United States Courts to decline jurisdiction when a foreign national has been kidnapped from his country of residence by United States law enforcement agents and tortured en route to arraignment on a criminal charge in the United States. The United States Court of Appeals for the Seventh Circuit in this case, and the Fifth and Eleventh Circuits in other cases, hold that jurisdiction should be retained under these circumstances (*United States v. Darby*, 744 F.2d 1508 (11th Cir., 1984) *cert. den.*, 471 U.S. 1100 (1985); *United States v. Winter*, 509 F.2d 975 (5th Cir., 1975) *cert. den.* 423 U.S. 825 (1975)); the Second and Ninth Circuit Courts of Appeal hold that jurisidiction should be declined (*United States v. Toscanino*, 500 F.2d 267 (2d Cir., 1974); *United States v. Valot*, 625 F.2d 308 (9th Cir., 1980)); and this Court has held that United States Courts must divest themselves of jurisdiction obtained in violation of international treaty and must dismiss prosecutions tainted by law enforcement conduct which shocks the conscience. *United States v. Rauscher*, 119 U.S. 407 (1988); *Ford v. United States*, 273 U.S. 593 (1927); *Cook v. United States*, 288 U.S. 102 (1933); *Rochin v. California*, 342 U.S. 165 (1952). The Court should settle this conflict in the Circuits and the misinterpretation of its precedents, because there is evidence that in recent years the United States has been using kidnapping and torture as institutionalized techniques for obtaining jurisdiction over foreign nationals, and according to the *New York Times* October 14, 1989, at p. 6, the Justice Department has officially approved FBI kidnapping on foreign soil as a law enforcement technique.

Petitioner was seized by abduction in violation of international law, the *1909 Extradition Treaty between the United States and Honduras* (37 Stat. 1616, 45 Stat. 2489), *the Inter Americas Treaty* of 1933, to which both the United States and Honduras are signatories (49 Stat. 3111), Article 102 of the *Constitution*

of the Republic of Honduras,[3] and decisions of this Court declining jurisdiction in such cases. In 1888, in *United States v. Rauscher*, 119 U.S. 407, the Court held that United States courts could not try an international fugitive in violation of a treaty provision which limited jurisdiction to crimes set forth in an extradition request. In 1927, the Court in *Ford v. United States*, 273 U.S. 593, held that if a motion to bar prosecution had been made prior to the trial of defendants illegally seized in violation of international treaty, the case would have been dismissed. In 1933, in *Cook v. United States*, 288 U.S. 102, 121, the Court held again that where the seizure of a boat used for smuggling liquor was rendered illegal by international treaty, "Our government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws." And again in 1936, the Court held, "the Constitution creates no executive prerogative to dispose of the liberty of the individual... The legal authority does not exist save as it is given by act of congress or by terms of a treaty." *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5,9 (1936).[4]

The Court has never retreated from the *Rauscher-Ford-Cook* bar to jurisdiction in violation of treaty. Rather, it has expanded upon the legal bases and factual circumstances that would require a United States Court to divest itself of the right to proceed to conviction in a criminal case. In 1952, in *Rochin v.*

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[3] The 1909 Treaty guarantees adherence to Honduran Constitution Article 102, which provides that no Honduran citizen may be extradicted "nor turned over to the authorities of a foreign state," and the 1933 Treaty specifically accords to the citizens of signatory countries "the right to use all the remedies and resources authorized" against extradition requests which have to be "determined in accordance with the domestic legislation of the surrendering state." According to Articles 2 and 8 of the 1933 Treaty, the United States was obligated to formally seek extradition and upon its denial, Honduras was obligated to try petitioner for the offenses charged in the extradition request.

[4] International law is violated by government abduction and torture. 1 *Oppenheim, International Law* 295 (8th ed., 1955); *The Universal Declaration of Human Rights*, GA Res. 217A (III), U.N. Doc. A/810, at 71, Articles 3,5,9; *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 UNTS 171 reprinted in 6 ILM 368 (1967) Article 9(1); *Restatement (Third) of the Foreign Relations Law of the United States* §§ 432(2), 433(1)(b).

California, 342 U.S. 165, 171-172, the Court held that, "Regard for the requirements of the Due Process clause inescapably imposes upon this Court an exercise of judgment . . . to ascertain whether . . . this course of proceeding by agents of the government is bound to offend even hardened sensibilities [with] methods too close to the rack and the screw to prevent constitional differentiation." In *Rochin*, government agents pumped a stomach; in this case they abducted petitioner, hooded him, and beat and burned him with a stun gun repeatedly over a tweny-four hour period. "This is conduct that shocks the conscience." *Rochin*, *supra*.

The Court has repeatedly reaffirmed the *Rochin* principle in distinguishing cases where government conduct did not involve physical abuse such as kidnapping and torture. In *United States v. Russell*, 411 U.S. 423, 431-32 (1973), the Court cited *Rochin* and reaffirmed that there could be cases "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction."[5] In *Russell* the government agents did not do violence; they supplied the chemical compounds for manufacture and sale of illicit drugs. Nor was violence involved in the group of cases relied upon by the Seventh Circuit in which this Court held that dismissal was not the remedy for technical violations of the Fourth Amendment law of search and seizure. Those cases, as well as this Court's recent decision in *United States v. Verdugo-Urguidez*, ____ U.S. ____, 110 S. Ct. 1056 (1990), dealt with Fourth Amendment violations which did not implicate the outrageousness component of Fifth Amendment due process. Kidnapping, violence, and the abrogation of international treaties were not involved. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *United States v. Crews*, 445 U.S. 463 (1980); *Gerstein v. Pugh*, 420 U.S. 103 (1975). Warrantless arrests on probable cause or reasonable suspicion, or less, may

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[5] The Seventh Circuit erroneously discounted *Russell's* applicability to this case claiming "Matta does not base his argument on this defense." *Matta-Ballesteros v. Henman*, *supra*, slip. op. at 16, n.9. *Russell* relied on *Rochin* and Fifth Amendment due process, therefore it was not necessary to cite *Russell* to render it applicable to petitioner's arguments.

indeed be illegal and constitutionally violative, but they are more examples of "combatting crime too energetically" (*Rochin v. California*, *supra*) than of the vicious, sadistic actions employed here in the name of the United States government. Petitioner's claims are made under the Fifth Amendment, not the Fourth Amendment.

This Court has also traditionally invoked its supervisory power to retain for the Courts the integrity which the executive branch sometimes compromises in the name of expedience. *United States v. Hasting*, 461 U.S. 499 (1983); *McNabb v. United States*, 318 U.S. 332 (1946). The supervisory power is the last bastion of restraint on widespread governmental excess where other remedies are unavailable or are not effective. Petitioner had offered to prove, and the lower Courts assumed for the sake of legal argument, that kidnapping and torture have become institutionalized methodology of the United States in foreign arrests and that the order for the use of those methods against petitioner came from central authorities in the agencies involved. The preliminary evidence submitted with petitioner's request for a hearing is set forth in the Statement of the Case, *supra*, and the institutionalization of these practices has been legally approved by the Justice Department and recognized in condemnation by a Judge of the United States Court of Appeals for the Second Circuit, who has written,

> To my mind the Government in the laudable interest of stopping the international drug traffic is by these repeated abductions inviting excercise of that supervisory power in the interests of the greater good of preserving respect for law.

United States v. Lira, 515 F.2d 68, 72-73 (1975) (Oakes, C.J., concurring), *cert. den.* 423 U.S. 847 (1975).

Even in cases of an individual law enforcement officer's violation of constitutional rights, the possibility of civil remedies against the officer is not an effective alternative to exclusion or dismissal. *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971); *Terry v. Ohio*, 392 U.S. 1, 12 (1968). The very proliferation and

official sanction of the kidnappings in recent years proves the inefficacy of remedies short of dismissal, just as the proliferation of illegal searches and seizures proved to this Court the inefficacy of remedies other than the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643 (1961).[6] Indeed, civil redress may be unavailable in this case according to the exception to the Federal Tort claims Act for "any claim arising in a foreign country." 28 U.S.C. § 2680(k).

Thus, the Seventh Circuit and the other Circuits in accord with it, are wrong when they rest their opposition to dismissal on the availability of other remedies and on cases in the Fourth Amendment context which do not involve torture and kidnapping and the institutionalized governmental practice thereof. They are also wrong in employing the so-called *Ker-Frisbie* doctrine that "the power of a court to try a person for a crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of a 'forcible abduction'." *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (citing *Ker v. Illinois*, 119 U.S. 436 (1886)). This Court has expressly held that the doctrine is not applicable where a treaty of the United States has been violated. *Ford v. United States*, 273 U.S. 593, 605-606 (1927),[7] and *Ker* and *Frisbie* involved abductions only. No court, save the Seventh Circuit in this case, has applied the doctrine to retain jurisdiction in cases of torture or in cases of kidnapping

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[6] Separate civil redress may be the only appropriate remedy when the law enforcement misconduct is itself unrelated to the criminal case. Hence the Seventh Circuit's citation to *Graham v. O'Connor*, 109 S. Ct. 1865 (1989) and *Bell v. Wolfish*, 441 U.S. 520 (1979) where damages and injunctions were held to be the only remedies for constitutionally violative pre-trial conditions of confinement are inapposite. In this case kidnapping and torture initiated the criminal case.

[7] "But the *Ker* Case does not apply here. It related to a trial in a state court, and this court found that the illegal seizure of the defendant therein violated neither the federal constitution, nor a federal law, nor a treaty of the United States, and so that the validity of their trial after alleged seizure was not a matter of federal cognizance. Here a treaty of the United States is directly involved, and the question is quite different."

as governmental practice, and the Second and Ninth Circuits have held the *Ker-Frisbie* doctrine inapplicable in such cases and would decline jurisdiction.

In *United States v. Toscanino*, 500 F.2d 267 (2d Cir., 1974), the Second Circuit held that if the defendant could prove his allegations that he was kidnapped from his home in Uruguay and tortured by United States agents en route to court in the United States, the case should be dismissed. The element of torture brought the case within the *Rochin* undue process shocking to the conscience. Petitioner in this case has submitted sworn allegations to the same facts and has asked for the same opportunity to prove them. Had he been incarcerated in the Second Circuit he would have been granted the hearing. Likewise in the Ninth Circuit. *United States v. Lovato*, 520 F.2d 1270 (9th Cir., 1975) *cert. den.* 423 U.S. 985 (1975); *United States v. Valot*, 625 F.2d 308 (9th Cir., 1980); *United States v. Fielding*, 645 F.2d 719 (9th Cir., 1981). Even without the torture element, these Courts would have granted the hearing because of the evidence that the United States government is using kidnapping in foreign countries as a regular means of affording jurisdiction to United States Courts and that it was specifically ordered against petitioner by central law enforcement authorities. "If this assumption [that kidnappings will not be numerous] should in the future prove to be ill-founded, our conclusion [that kidnapping alone does not require dismissal] can be reconsidered." *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62, 68 n.9 (2d Cir., 1975) *cert. den.* 421 U.S. 1001 (1975); *United States v. Lira*, 515 F.2d 68, 72-73 (2d Cir., 1975) (Oakes, C.J. concurring) *cert. den.* 423 U.S. 847 (1975); *United States v. Emery*, 591 F.2d 1296 (9th Cir., 1978); *United States v. Trenary*, 473 F.2d 680 (9th Cir., 1973).

Even in the Fifth and Eleventh Circuits the rejections of the *Toscanino* exception to the Ker-Frisbie doctrine have come in cases where there were no allegations of torture (*United States v. Darby*, 744 F.2d 1508, 1531 (11th Cir., 1984) *cert. den.* 471 U.S. 1100 (1985)), and no allegations of a pattern of governmental abuse or central direction of such abuse against the defendant at issue. *United States v. Herrera*, 504 F.2d 859 (5th Cir., 1974);

United States v. Lava, 539 F.2d 495 (5th Cir., 1976); *United States v. Lopez*, 542 F.2d 283 (5th Cir., 1976).

Finally, that foreign government objection is necessary to United States recognition of treaty and international law proscriptions against jurisdiction by kidnapping is not a requirement founded in this Court's decisions. The Seventh Circuit cites to no decision of this Court for that exception to the law laid down in *United States v. Rauscher, supra*; *Ford v. United States, supra*, and *Cook v. United States, supra*. Law is supposed to provide a guide to rightful conduct and a deterrent to illegality before action is taken; there is no precedent for ex post facto, ad hoc decriminalization on a case-by-case basis, and the treaties do not so provide. Executive action was limited by the terms of the treaties which *prima facie* indicate their self-executing nature without additional legislation and their intent that the parties be bound. *United States v. Schouweiler*, 19 F.2d 387 (S.D. Cal., 1927); *United States v. Ferris*, 19 F.2d 925 (N.D. Cal., 1927). There was no determination to the contrary by the lower courts in this case, and no assertion of, or hearing into, parole evidence of contrary intentions in regard to the treaties, therefore the resort to lack of official foreign government protest to negate self-execution of the treaties was akin to using the silence of legislators to justify amnesty in a particular case of violation of a law previously enacted by them.

In fact, however, the Honduran government and its people have protested. Honduran Congressman Feliz Cerna Salgado has submitted an affidavit of protest on behalf of himself and other republic officials and civic organizations, and he has described the mass protests in the streets against petitioner's abduction. Several Congressman have introduced a bill of protest in the Honduran legislature.

CONCLUSION

FOR THE ABOVE STATED REASONS, CERTIORARI SHOULD BE GRANTED, THE JUDGMENT OF THE COURT OF APPEALS REVERSED, AND THE WRIT OF HABEAS CORPUS ISSUED.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 88-2767

JUAN RAMON MATTA-BALLESTEROS,

Petitioner,

v.

GARY L. HENMAN, Warden,
United States Penitentiary
at Marion, Illinois,

Respondent.

Appeal from the United States District Court for
the Southern District of Illinois.
No. 88 3267—**William D. Stiehl**, *Judge.*

ARGUED NOVEMBER 1, 1989—DECIDED FEBRUARY 21, 1990

Before CUMMINGS and FLAUM, *Circuit Judges*, and WILL, *Senior District Judge.**

FLAUM, *Circuit Judge.* Juan Ramon Matta-Ballesteros ("Matta"), petitions this Court by writ of habeas corpus claiming that the United States illegally kidnapped him from his home in Honduras and tortured him before transport-

* The Honorable Hubert L. Will, Senior District Judge of the United States District Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

ing him to the United States to face trial on pending criminal charges. Based on these allegations, Matta claims that the United States violated the Honduran Constitution, international law, and the due process clause of the United States Constitution and as a result, the United States is without personal jurisdiction over him. The district court denied his petition without a hearing on the basis that the facts, as alleged, did not entitle him to the requested relief. Matta petitions us to remand the case to the district court for an evidentiary hearing. For the reasons set forth below, we affirm.

I. FACTS

In 1971, Matta escaped from the United States Prison Camp at Eglin Air Force Base in Florida and fled to Honduras. He is a Honduran citizen and because Honduras does not extradite its own citizens, he believed that he had found a safe haven from the reach of United States law enforcement officials. While he was in the Honduras, he allegedly became heavily involved in the narcotics trade and now faces criminal charges in the federal district courts of Arizona, Central California, and Southern California. At the time he filed the writ, he was also under indictment in the Northern District of Florida for escape pursuant to 18 U.S.C. § 751(a). He has since been convicted of that crime and sentenced to three years imprisonment.

At about 6:00 a.m. on the morning of April 5, 1988, Matta, accompanied by his bodyguards, arrived at his home in Tegucigalpa, Honduras.[1] Upon his arrival, Matta was surrounded by armed members of the Honduran Special Troops or "Cobras," who were accompanied by at least four United States Marshals. He was arrested and handcuffed, allegedly at the direction of the United States Marshals. A black

[1] Since Matta was denied discovery and an evidentiary hearing, we consider the facts alleged in the pleadings and affidavits in the light most favorable to him in determining whether to grant the writ.

hood was placed over his head and he was pushed onto the floor of a car driven by the United States Marshals.

A United States Marshal immediately drove him to a United States Air Force base approximately an hour-and-a-half away. During the ride, Matta claims that he was severely beaten and burned with a "stun gun"[2] at the direction of the United States Marshals. Once he arrived at the airport, Matta was flown to the United States. He claims that during this flight, he was once again beaten and shocked about the body, including on his testicles and feet, again by United States Marshals.

Upon his arrival in the United States, Matta was immediately transferred to Marion Penitentiary. Approximately 24 hours had passed from the time of his apprehension. Matta was subsequently examined by a physician who found abrasions on his head, face, scalp, neck, arms, feet, and penis, as well as blistering on his back. According to the examining physician, these injuries were consistent with those which could have been caused by a stun gun.

Based on these allegations, Matta filed a writ of habeas corpus in the Southern District of Illinois claiming that the United States had acted in violation of the Honduran Constitution, international law, and the United States Constitution. He demanded his release back to Honduras on the basis the United States was without jurisdiction to prosecute him as a result of the alleged due process violations.

At the time he filed the writ, Matta faced indictment in the Northern District of Florida for escape from the United States Prison Camp at Eglin Air Force Base in 1971, along with indictments on various narcotics charges

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[2] The stun gun or "Taser" is a non-lethal device commonly used to subdue individuals resisting arrest. It sends an electric pulse through the body of the victim causing immobilization, disorientation, loss of balance, and weakness. *See Thomas v. City of Zion*, 665 F.Supp. 642, 644 (N.D. Ill. 1987). It leaves few, if any, marks on the body of the victim. Aff. of D. Donovan.

in the central and southern districts of California, and the district of Arizona. After filing the writ, he sought a preliminary injunction to prevent the government from transferring him from Marion to face prosecution in these districts. *Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F.Supp. 1036 (S.D. Ill. 1988). Matta did not face charges anywhere within the jurisdiction of the district court where he brought his petition. He was simply being held in Marion Penitentiary pending transfer to jurisdictions where he did face charges. The preliminary injunction was denied by the district court on the basis that Matta failed to establish that he had no adequate remedy at law and failed to show irreparable harm. *Id.*

After denying the preliminary injunction, the district court ordered an expanded record from the parties, including affidavits from the petitioner and any occurrence witnesses. In addition to other documents, Matta filed affidavits from his bodyguards who were with him at the time of his arrest confirming his allegations. The government filed affidavits by various United States Marshals denying most of Matta's allegations, especially those concerning torture. The United States contended that the Honduran government, and not the United States, arrested Matta and was responsible for any mistreatment. Based on this expanded record, the district court found that Matta's claims failed as a matter of law, holding that even if the facts were as Matta alleged, he was not entitled to the relief he sought. The court, therefore, denied Matta's request for discovery and an evidentiary hearing, ruling on the pleadings and affidavits alone, much in the manner of a summary judgment. *Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F.Supp. 1040 (S.D. Ill. 1988). Since the district court's denial of the writ, Matta has been transferred to a prison in Florida, arraigned, tried, and convicted of escape from federal custody. 18 U.S.C. § 751(a).[3]

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[3] Prior to trial, the district court in Florida heard similar arguments to those presented here and decided, in a published opinion,

(Footnote continued on following page)

No. 88-2767

II. ANALYSIS

The district court's decision not to grant an evidentiary hearing was based on Rule 8(a) of the Rules Governing Section 2254 Cases[4] (the "Rules") which states that after the transcript and record of the state court proceedings are filed, the trial judge may determine if an evidentiary hearing is needed, and if not, shall "make such disposition of the petition as justice shall require." Rule 8(a) of the Rules; 28 U.S.C. § 2554. The district court held that it could consider the facts much as in a summary judgment motion, reading any facts in dispute in favor of the non-movant, in this case Matta, and then applying the law to those facts.

Matta's only claim on appeal is based on this denial: he claims he was entitled to an evidentiary hearing by the district court. To advance this claim, Matta presents two arguments. First, he asserts that he was entitled to an evidentiary hearing because of the unique posture of his case, i.e., there was no trial court record upon which the denial of the writ could be based. Second, he maintains that the facts, as he alleges them, entitle him to relief as

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[3] *continued*

that the United States had jurisdiction over Matta. *United States v. Matta-Ballesteros*, 700 F.Supp. 528 (N.D. Fla. 1988). This decision has apparently been appealed to the Eleventh Circuit. Counsel for Matta told us at oral argument that Matta has also raised these claims before a district court sitting in the Ninth Circuit. That court apparently held that Matta was collaterally estopped from bringing those claims because they had been fully and fairly litigated by the district court in the case at hand.

[4] This suit was brought under 28 U.S.C. § 2254 which provides relief from state custody. Technically, this suit should have been brought under 28 U.S.C. § 2255, as Matta was asking for relief from federal custody. Sections 2254 and 2255, however, are materially the same for the purposes of our analysis, except as indicated in note 6, and therefore, for the purposes of this case, we will not distinguish between these statutes. *See United States v. Hayman*, 342 U.S. 205 (1952), *Hill v. United States*, 368 U.S. 424 (1962). *See also* § 2255 Rules.

a matter of law, and therefore, there are material issues of fact that must be determined through an evidentiary hearing. We consider each of these in turn. Both claims present questions of law, so we review the district court's decision *de novo*. *See Christianson v. Colt. Indust. Operating Corp.*, 870 F.2d 1292, 1299 (7th Cir. 1989).

A. Denial of an Evidentiary Hearing

Matta's first contention is, in essence, that where there has been no prior trial, a writ of habeas corpus may not be denied without a hearing.[5] Common sense, however, dictates that if the facts as alleged by the applicant do not entitle him to relief, a hearing at which the applicant may prove those facts is useless. This reasoning, which was relied on by the district court, is reflected by 28 U.S.C. § 2254(d) and by the decisions of both this Court and the Supreme Court.

The Seventh Circuit has held that "an evidentiary hearing is not necessary when the facts essential to consideration of the constitutional issue are already before the court." *Jeter v. Keohane*, 739 F.2d 257 n.1 (7th Cir. 1984); *see also Bergenthal v. Cady*, 466 F.2d 635, 648 (7th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973). Our holding in *Jeter*

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[5] To advance this argument he observes that habeas petitions are normally brought after sentencing, not before trial. Rule 8(a), upon which the district court relied, assumes that this is the case. It states that "*after* . . . the transcript and record of state court proceedings is filed" the judge shall decide if an evidentiary hearing is necessary. Rule 8(a) of the Rules Governing Habeas Corpus. Matta argues, the trial transcript is vital to the decision to grant the writ. *Townsend v. Sain*, 372 U.S. 293, 319 (1963), ("[t]he trial record is indispensable to determining whether the habeas application received a full and fair . . . evidentiary hearing"). Matta concludes from this, that because he never had an evidentiary hearing at trial and because it is indispensable to the decision to grant the writ, he deserves a hearing now. That is, Matta argues, a habeas petition deserves some kind of evidentiary hearing, whether it is during the underlying criminal trial or during the habeas hearing, and as he has not yet had a chance to present evidence, he deserves one now.

is based on *Townsend v. Sain*, 372 U.S. 293, 319 (1963) and its codification at 28 U.S.C. § 2254, both of which detail the situations where an evidentiary hearing is mandatory. Each situation listed by *Townsend* assumes that material facts are in dispute. Two of the listed situations are relevant for our purposes. First, the Court stated that a hearing is mandatory where "the merits of the factual dispute were not resolved in the state court hearing." 372 U.S. at 313. The merits of a dispute, however, only concern material facts. Second, the Court required a hearing where "the *material* facts were not adequately developed. . . ." *Id.* at 313. Again, material facts must be at issue. Section 2254 echoes the requirements of *Townsend*.[6] Section 2254(d)(3), the provision most applicable to this case, mandates a hearing when "*material* facts were not adequately developed . . . ." 28 U.S.C. § 2254(d)(3). Similarly, section 2254(d)(1) requires a hearing when the merits of the factual dispute were not resolved earlier. Once again, the "merits" of a dispute only concern material facts.

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[6] Section 2254(d) requires an evidentiary hearing when the applicant shows any of the following circumstances:

> "(1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> "(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> "(3) that the material facts were not adequately developed at the State court hearing;
>
> "(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> "(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> "(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> "(7) that the applicant was otherwise denied due process of law in the State court proceeding."

28 U.S.C. § 2254(d).

Neither *Townsend* nor § 2254 require a hearing where no material facts are in dispute.

Moreover, under the Rules Governing Habeas Corpus, "the district judge . . . may employ a variety of measures in an effort to avoid the need for an evidentiary hearing." *Blackledge v. Allison*, 431 U.S. 63, 81 (1977). For instance, rule 6(a) requires good cause for discovery in habeas proceedings. Good cause cannot exist where the facts alleged do not provide a basis for relief. Rule 7 which governs expansion of the record, is a method specifically designed to avoid evidentiary hearings. When enacting the rule, the advisory committee noted that "the purpose [of Rule 7] is to enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing." Advisory Committee Note to Rule 7 of the Rules Governing Habeas Corpus. Moreover, Rule 8 mandates that when a hearing is not required by section 2254, the trial judge shall "make such disposition of the petitions as justice shall require." Finally, Rule 11 of the Rules Governing Habeas Corpus allows courts to follow the Federal Rules of Civil Procedure during habeas proceedings where they are not inconsistent with the habeas rules. Here, the district court followed the procedure for summary judgment and in doing so was not acting inconsistently with the habeas rules governing when a hearing is necessary. Each of these rules directs district judges to expedite the process, hearing evidence only when necessary. Where there are no material facts at issue, it is consistent with these rules to decide the case without a hearing. We conclude in light of this analysis that Matta was entitled to an evidentiary hearing only where material facts are in dispute, notwithstanding the unique posture of his case.

B. The Applicable Law

If Matta's allegations do not entitle him to relief, then we may rule as a matter of law, taking his allegations to be true. We, therefore, examine the applicable law to

determine if any of Matta's claims entitle him to relief. Matta makes two claims. First, Matta asserts that his arrest violates international law, namely the Honduran Constitution and two extradition treaties to which the United States and Honduras were parties. Second, Matta contends his abduction violated the fifth amendment due process clause. We consider each in turn.

1. Violations of International Law

It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved. "[E]ven where a treaty provides certain benefits for nationals of a particular state—such as fishing rights—it is traditionally held that 'any rights arising from such provisions are, under international law, those of states and . . . individual rights are only derivative through the states.' " *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975) (quoting *Restatement (Second) of the Foreign Relations Law of the United States* § 115, comment e (1965)). Treaties are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress." *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988). *See also United States v. Cadena*, 585 F.2d 1252, 1261 (5th Cir. 1979); *United States v. Davis*, 767 F.2d 1025, 1030 (2nd Cir. 1985); *United States v. Cordero*, 668 F.2d 32, 37-38 (1st Cir. 1981); *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980).

Matta makes no claim that the government of Honduras has made an official protest. Indeed, Matta admits that the Honduran military cooperated in his arrest. Instead, he asserts that the protests before the American Embassy in Honduras and a bill introduced in the Honduran legislature (which was never voted on) show that the people of Honduras objected to the abduction. The United States,

however, recognizes the Honduran government as the official government of the Republic of Honduras. Were we to conclude that Honduras protested Matta's arrest in the absence of word from the Honduran government, we would be denying the sovereignty of the Republic of Honduras. *See Societe Nationale v. United States Dist. Court*, 107 S.Ct. 2542, 2562 (1987) ("each state has a monopoly of governmental power within its borders"). Without an official protest, we cannot conclude that Honduras has objected to Matta's arrest. Therefore Matta's claims of violations of international law do not entitle him to relief.

2. Violation of Matta's Fourth and Fifth Amendment Rights

For the past 100 years, the Supreme Court has consistently held that the manner in which a defendant is brought to trial does not affect the ability of the government to try him. The *Ker-Frisbie* doctrine, as this rule has come to be known, states that "the power of a court to try a person for a crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of a 'forcible abduction' ". *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (citing *Ker v. Illinois*, 119 U.S. 436 (1886)). While notions of due process have been expanded since *Frisbie*, *see Rochin v. California*, 342 U.S. 165 (1952); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court has consistently reaffirmed the *Ker-Frisbie* doctrine. *See e.g. I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984); *United States v. Crews*, 445 U.S. 463, 474 (1980); *Stone v. Powell*, 428 U.S. 465, 485 (1976); *Gerstein v. Pugh*, 420 U.S. 103 (1975). In *United States v. Crews*, the Court recognized that "[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. . . . Respondent himself is not a suppressible 'fruit' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt . . ." 445 U.S. at 474. And in *Gerstein v. Pugh*, the Court held that "[n]or do we retreat from the established rule that illegal arrest or detention does

not void a subsequent conviction." 420 U.S. at 119. It is, therefore, inadequate for Matta to allege, without more, that the arrest was illegal.

To create a colorable argument in the face of this rule, Matta relies on an "exception" to the *Ker-Frisbie* doctrine carved out by the Second Circuit in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). Prior to trial for narcotics offences, Toscanino challenged the ability of the district court to try him, contending his presence had been illegally obtained through torture and kidnapping by the United States. Toscanino offered to prove in support of his motion that he and his pregnant wife had been lured from his home in Montevideo, Uruguay to a deserted area. There, Toscanino claimed, he was abducted by being knocked unconscious with a gun, placed into a car, bound and blindfolded and driven across the border to Brasilia where he was incessantly tortured and interrogated for seventeen days. After this ordeal Toscanino was drugged and placed on an American commercial flight. Once he arrived in the United States, he was taken into custody by waiting United States law enforcement officials.

Faced with these allegations, the Second Circuit held that "we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." 500 F.2d at 275. In so holding, that court relied on *Rochin v. California*, 342 U.S. 165 (1952), where the Supreme Court applied the due process clause, to the "the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offences." *Id.* at 169 (citations omitted). *See also United States v. Russell*, 411 U.S. 423 (1973).

In *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975), the Second Circuit clarified and narrowed *Toscanino*. In this case, the

court was faced once again with an international abduction but there was no contention of torture or terror. The Second Circuit said that *Toscanino* only applied where the defendant could prove "torture, brutality, and similar outrageous conduct," and therefore, there was no violation of the due process clause. *Id.* at 65. The conduct must "shock the conscience" before a violation can occur. *Id.*, (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)). Matta asserts that he falls under *Toscanino* and *Gengler*.

The Seventh Circuit has never squarely faced the *Toscanino* exception to the *Ker-Frisbie* doctrine. In *United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977), this Court expressly refrained from deciding whether to follow *Toscanino* and we have not faced the issue since. Several other circuits, however, have considered *Toscanino*. While the Ninth Circuit has adopted this exception, *United States v. Valot*, 625 F.2d 308, 309 (9th Cir. 1980), the Fifth and the Eleventh Circuits have rejected it. *United States v. Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); *United States v. Winter*, 509 F.2d 975, 986-988 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975). In addition, no court, including the *Toscanino* court which remanded the case for factual findings, has ever found conduct that rises to the level necessary to require the United States to divest itself of jurisdiction. The decision to follow *Toscanino* is now squarely before this Court.

We initially note that *Toscanino* is of ambiguous constitutional origins. On its face, *Toscanino* purports to rely on the due process clause (of either the fifth amendment or the fourteenth amendment). Yet the Second Circuit relied for support on *Mapp v. Ohio*, 367 U.S. 643 (1961), a fourth amendment exclusionary rule case.

The due process clause has been held to "protect[ ] a pre-trial detainee from the use of excessive force that amounts to punishment." *Graham v. Connor*, 109 S.Ct. 1865, 1871 n.10 (1989) (citing *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979)). Under this holding, if Matta could prove that he was punished as a pre-trial detainee, then he might

be entitled to some relief under the due process clause (although not necessarily the divestiture of jurisdiction by the United States). Matta, however, does not allege punishment during his pre-trial detention at Marion prison. Instead, he claims that he was tortured during the course of his arrest.[7]

Claims such as Matta's involving constitutional violations during arrest, however, are properly analyzed under the fourth amendment rather than the fifth amendment. While examining a claim of use of excessive force during arrest, the Supreme Court recently held that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing [claims of excessive force]." *Graham*, 109 S.Ct. at 1871. *See also United States v. Miller*, Slip Op. No. 89-1615 (7th Cir. December 18, 1989) (Easterbrook, J. concurring).

Graham, however, concerned a § 1983 action for use of excessive force while Matta has brought a habeas petition. Nevertheless, underlying Matta's petition is the use of excessive force by the police and, therefore, a similar analysis is appropriate. The fourth amendment covers claims for excessive force such as Matta's under a reasonableness standard by balancing "the nature and quality of the intrusion on the individual's fourth amendment interests" against the governmental interests at stake. *United States v. Place*, 462 U.S. 696, 703 (1983). And "the 'reasonableness' of a particular seizure depends not only on *when*

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[7] The concurrence argues that the torture took place after the arrest. If the concurrence is correct that the arrest took place in Honduras and the ensuing flight to the United States was part of pretrial detention, then the due process clause would clearly be implicated. *Bell v. Wolfish*, 441 U.S. 520 (1979). The remedy, however, for violations of the due process clause during pre-trial detention is not the divestiture of jurisdiction, but rather an injunction or money damages. *See id.*

it is made, but also on *how* it is carried out." *Graham*, 109 S.Ct. at 1871 (emphasis in original). Under this reasonableness standard, the fourth amendment provides an explicit textual basis for claims such as Matta's of unconstitutional conduct during arrest.

Matta's requested relief, however, is not supported by the fourth amendment. His claim is essentially an exclusionary rule for the body of the defendant. Exclusionary rules are simply means of enforcing the provisions of the constitution.[8] *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Leon*, 468 U.S. 897, 911-22 (1984). "The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights." *Stone*, 428 U.S. at 486; *see also Leon*, 468 U.S. at 911-22. In addition, the imperative of maintaining judicial integrity may play some role in the exclusionary rule calculus. *See United States v. Peltier*, 422 U.S. 531 (1975). *But see Stone*, 428 U.S. at 485. We believe that neither rationale supports the application of the exclusionary rule to this case.

There are several reasons why the deterrence rationale fails to support the application of the exlcusionary rule to the present case. First, the Supreme Court has explicitly rejected the use of the deterrence rationale in this situation. In *United States v. Crews*, the Court held:

> The exclusionary principle of *Wong Sun* and *Silverthorne Lumber Co.* delimits what proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness. Respondent is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove

[8] This is the one area where the district court's use of § 2254 would result in a different analysis because *Stone* precludes exclusionary rule claims under § 2254 but left open the question under § 2255. Reasons such as comity may dictate such a difference, and therefore, it is important to petition for habeas under the correct statute.

> guilt through the introduction of evidence wholly untainted by the police misconduct.

445 U.S. 463, 474 (1980). This decision is based on the Court's opinion that the deterrent effect of excluding the body of the defendant is not sufficient to warrant this extreme measure: "[s]o drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." *Crews*, 445 U.S. at 474 n.20 (quoting *United States v. Blue*, 384 U.S. 251, 255 (1966)).

In addition, there are other means of deterring police misconduct in cases such as this that are less intrusive than a constitutionally based exclusionary rule. For example, Matta could file a *Bivens* action alleging violation of his due process rights. Alternatively he could ask that the case be dismissed for prosecutorial misconduct. (We take no position on the merits of these claims.) Moreover, complaints from foreign nations of violations of international law as well as the loss of international standing provide an additional deterrent effect. We believe, that where the interference with the judicial process is so severe and where other means of deterrence are already in place, the additional deterrence created by the exclusionary rule is not enough to justify its use.

In *Stone*, the Court considered the judicial integrity rationale for the exclusionary rule. The Court stated that the imperative of judicial integrity plays a limited role, holding that judicial integrity itself is not enough to mandate a retreat "from the proposition that judicial proceedings need not abate when the defendant's person is unconstitutionally seized." 428 U.S. at 485. In addition, reliance on the judicial integrity rationale has become suspect in recent years. In *Leon*, the Court held that the "the question of whether the use of illegally obtained evidence in judicial proceedings represents judicial participation in a Fourth Amendment violation and offends the integrity of the courts is essentially the same as the inquiry

into whether exclusion would serve a deterrence purpose . . . ." 468 U.S. at 921 n.21. (citations omitted). Therefore, analysis of the judicial integrity rationale separate from the deterrence rationale may not be warranted. Moreover, judicial integrity can be protected through motions for prosecutorial misconduct.

Finally, the Supreme Court has twice more (in addition to *Stone* and *Crews*) reaffirmed *Ker-Frisbie* since *Toscanino*, although it is unclear on what grounds. In *Lopez-Mendoza*, the Court reaffirmed that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." 468 U.S. at 1039-40. And in *Gerstein v. Pugh* the Court stated that "[n]or do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction." 420 U.S. at 119.

While we do not condone government misconduct such as Matta alleges, we cannot create an exclusionary rule for the person of the defendant in light of our analysis and in the face of repeated re-affirmation by the Supreme Court that no such rule exists. The Court has rejected both the deterrence and the judicial integrity rationales for the exclusionary rule applied to this context. We therefore conclude that *Toscanino*, at least as far as it creates an exclusionary rule, no longer retains vitality and therefore decline to adopt it as the law of this circuit.[9] If Matta

[9] As we have rejected *Toscanino* on exclusionary rule grounds, we take no position on whether the government's conduct, as alleged, violated the fourth amendment. In addition, we do not reach the "outrageous government conduct" defense of *United States v. Russell*, 411 U.S. 423 (1973). Matta does not base his argument on this defense and even if he had, we recently noted that the continued vitality of this doctrine is questionable given the holding of a three-justice plurality in *Hampton v. United States*, 525 U.S. 484 (1976). *United States v. D'Antoni*, 874 F.2d 1214 (7th Cir. 1989). To the best of our knowledge, there are no cases that apply the outrageous government conduct defense to allegations of torture such as those in the present case.

wishes to object to his mistreatment, he must do so on other grounds. Matta has failed to state a claim upon which relief can be granted. Accordingly, we affirm the district court.[10]

WILL, *Senior District Judge*, concurring. I concur in the result reached by the majority. I would not, however, have taken the same road to get there. There is no need to disparage or reject *Toscanino* in this case, which is clearly distinguishable on its facts. First, the torture Toscanino alleged was grossly more egregious than what Matta alleges, although both shock the conscience. Second, and perhaps more importantly, release as contemplated in *Toscanino* is not an appropriate remedy here. Matta was a fugitive and release would mean effectively commuting his earlier, lawfully imposed sentence, an unwarranted result. That was not the case in *Toscanino*.

The last time *Toscanino* was raised in this circuit we refrained from deciding whether to follow it, on the basis that the case in front of us was distinguishable. *United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976). I would have taken that route here too, leaving open the question whether or not to follow it until we are presented with a case with comparable facts.

It is conceivable to me that, in the words of Justice Rehnquist, there may be cases "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431-32 (1973) (entrapment case) (citing *Rochin v. California*, 342 U.S. 165 (1952) (not an

[10] We take no position on the collateral estoppel effects of this decision except to note that Matta has failed to state a claim upon which relief can be granted.

entrapment case)). *See also Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). This court has previously expressed skepticism about whether the government would ever, by outrageous conduct, surrender its authority to prosecute as a matter of due process. *E.g.*, *United States v. D'Antoni*, 874 F.2d 1214, 1219 (7th Cir. 1989); *United States v. Bontkowski*, 865 F.2d 129, 131-32 (7th Cir. 1989); *United States v. Curtis Miller*, No. 89-1615, slip op. at 12 (7th Cir. Dec. 18, 1989) (Easterbrook, J., concurring). But we have never foreclosed that possibility—for entrapment cases, excessive force cases, or any other kind of case—and I see no reason to reject *Toscanino* and thereby foreclose it for future cases by our decision today.

I have no doubt that judges will disagree about the level of outrageousness, if any, that it should take to bar judicial process. But the simple fact of disagreement does not make the determination of what "outrageous" conduct would consist of somehow judicially more unmanageable or subjective than, for instance, the balancing that goes into distinguishing a reasonable from an unreasonable search or even guilt from innocence, and I would reserve the possibility that some day we may, given the facts, want the option of attempting that determination.

Finally, the majority states that any excessive force used was applied "during the course of" Matta's arrest and assumes the arrest did not occur until Matta arrived at the U.S. border. An arrest occurs when a reasonable person, in view of all the circumstances, would believe himself to be under arrest. *United States v. Boden*, 854 F.2d 983, 991-93 (7th Cir. 1988); *United States v. Robertson-Steeprow*, 833 F.2d 777, 780 (9th Cir. 1987); *United States v. Borys*, 766 F.2d 304, 308-09 (7th Cir. 1985). Matta was therefore arrested long before he reached American soil. By that time, he had already been shoved into a van, with a hood over his head, and had been in the company of U.S. Marshals for twenty-four hours. I do not imagine that he was either traveling voluntarily or felt free to leave the marshals during those twenty-four hours. Accordingly, the ex-

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cessive force here would have been applied after Matta's arrest and during his pretrial detention before he reached Marion, removing this case from the reach of *Graham v. Connor*. *Graham* specifically reserves the question whether a fourth amendment analysis applies "beyond the point at which arrest ends and pretrial detention begins." 109 S.Ct. at 1871 n.10. That does not change the result to be reached in this case, however. Release remains an inappropriate remedy on the facts before us.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

JUAN RAMON MATTA-
BALLESTEROS, on the relation of
MARTIN R. STOLAR, his attorney,

Petitioner,

v. CAUSE NO. 88-3267

GARY L. HENMAN, Warden, United
States Penitentiary at Marion, Illinois,

Respondent.

MEMORANDUM AND ORDER

STIEHL, District Judge:

Before the Court is Juan Ramon Matta-Ballesteros' (Matta) Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. 2241 by a Person in Federal Custody.

I. INTRODUCTION

This cause is before the Court in a posture somewhat different from the majority of federal habeas actions which the court is regularly required to review. The petitioner is not challenging the duration or nature of his confinement; rather, he challenges the legality of his detention. Petitioner asserts that he was illegally and unconstitutionally taken from his home in Honduras and removed to the United States by federal agents. The relief Matta seeks is to have this Court declare that the United States is without jurisdiction over petitioner due to alleged violations of his right to due process in the manner of his apprehension, and order that Matta be returned to Honduras.

Matta is under indictment in the Northern District of Florida for an alleged escape from the United States Prison Camp at Eglin Air Force Base in 1971, and faces indictments on various narcotics charges in the Central and Southern Districts of California, and the District of Arizona. Matta originally sought a temporary restraining order from this Court to prevent the government from transferring him from the United States Penitentiary at Marion, Illinois, where he is currently detained, to face prosecution in any other district. The Court, upon consent of the government, entered its temporary restraining order on April 25, 1988. The Court directed the parties to brief certain issues prior to the preliminary injunction hearing on May 16, 1988. On May 4, 1988, again upon consent of the government, and for good cause shown, the TRO was extended until May 16, 1988. The Court heard extensive oral argument on the application for preliminary injunction, including arguments on the likelihood of success on the merits of the underlying habeas corpus action. The government agreed to a further extension of the TRO until the Court's ruling on the application for preliminary injunction.

On May 25, 1988, the Court denied Matta's application for a preliminary injunction. The Court ruled that petitioner had failed to establish that he lacked an adequate remedy at law; that he failed to show irreparable harm; and that the balance of harms did not weigh in petitioner's favor. The Court made no ruling as to the likelihood of success on the merits. The merits of Matta's habeas petition are now before the Court.

On June 2, 1988, the Court directed the government to show cause why the writ should not issue, and on June 20, 1988, ordered an expanded record from the parties, including affidavits from the petitioner and any occurrence witnesses. The parties have complied with the Order, and the Court has before it the petition for a writ of habeas corpus, the affidavits of Matta, certain occurrence and other witnesses, and certain reports.

II. BACKGROUND

A. *UNCONTROVERTED FACTS*

The following is a description of the events surrounding the arrest which are uncontroverted:

Juan Ramon Matta-Ballesteros, a/k/a Juan Ramon Mata del Pozo, a/k/a Juan Ramon Mata, (Matta) is a resident of Tegucigalpa, Honduras. Very early on the morning of April 5, 1988, Matta, accompanied by two security guards/drivers, went a short distance from his home to the residence of his attorney, Carlos D. Lorenzana. His guards remained outside while he went into the house. Within minutes of arriving, Matta received a telephone call from his wife. Matta exited his attorney's house to return to his home. Matta's security guards informed him that they had observed members of the military, described by one as the Honduras Special Troops known as "Cobra" watching the attorney's home while standing at either end of the street. Matta, accompanied by his security guards, drove the van back to his home.

Upon arriving at his home, Matta got out of the van and identified himself to members of the Honduran military. The van was surrounded by many military men with weapons. A beige Land Cruiser Toyota pickup truck pulled up and two men arrested Matta. Included among the group at Matta's house were some Americans in civilian clothing. Matta was grabbed, a brief struggle ensued, a black hood was placed over his head, and he was pushed onto the floor in the back seat of the Land Cruiser. At some point during the apprehension, Matta may have been shocked several times by a stun gun.

Deputy United States Marshal, Juan J. Donato Morales, drove the Land Cruiser to an air base, an hour to an hour and a half away. Sometime thereafter, Matta was placed on an airplane. He was subsequently flown to the United States, and then transferred to the United States Penitentiary at Marion, Illinois, in this District, early on the morning of April 6, 1988. Approximately 24 hours elapsed from the time of his apprehension to the time of his arrival at Marion Penitentiary.

Upon his arrival at Marion on April 6, 1988, Matta was given an initial medical examination. The examination revealed, in part, the following:

Clinical Evaluation	*Notes*
18. Head, Face, Neck and Scalp	Linear abrasions at left and posterior basal aspect of the neck
34. G-U System	Presence of depigmented area with some scaling at the left side of proximal shaft of the penis
35. Upper Extremities	Linear abrasions at the distal part of both forearms mostly at the lateral and posterior side. Palmar side of both hands are smeared light red (per pt's information it's from blood)
36. Feet	Abrasion about 1⅓ x ½ cm at dorsum of left foot
39. Identifying Body Marks, Scars, Tattoos	Multiple erythematous spots of about 3-5 mm at the back. Few of these spots have denuded skin compatible with ruptured blister

B. *CONTROVERTED FACTS*

The expanded record reveals the following questions of fact exist:

1. Petitioner asserts that a large group of United States agents were present at Matta's home. The government asserts that there were only four members of the United States Marshals Service near Matta's residence.

2. Petitioner asserts that he was seized by American "agents" in civilian clothing. The government asserts that the apprehension was made by Honduran officers, and that no United States agents were involved in the struggle with Matta.

3. Matta claims that the American agents, during the one and one half hour drive to the air base, beat him on the head, back and arms and burned him with a "double pronged electric." He further claims that they mixed their shocks with "shouted interrogation," in both English and Spanish (with non-Honduran accents). The government, through the affidavit of Deputy Marshal Donato Morales, asserts that Honduran officers placed Matta on the floor of the Land Cruiser, that one Honduran rode in the back seat with Matta, and the other with Donato Morales in the front. Donato Morales observed the officer in the front to carry a stun gun device which was placed on the floor. He did not see Matta receive shocks from the stun gun during the trip.

4. Matta claims that upon arrival at the air base he was placed aboard a jet and flown to the United States. The government asserts that Matta remained at the air base in an air conditioned vehicle for two to two and one half hours while awaiting an airplane.

5. Matta claims that during the two hour flight, the hood remained on his head and he was repeatedly beaten and shocked about the body, including his testicles and feet. He claims that upon arrival in the United States he was flown aboard a commercial jet to Puerto Rico and was forced to sign an Entry Declaration, and was advised that he was under arrest. The government denies that Matta was beaten or shocked during the trip to the United States, denies that he was flown from the United States to Puerto Rico, and denies that Matta was forced to sign an entry declaration.

III. APPLICATION OF LAW

Petitioner has asked this Court to issue a writ of habeas corpus and declare that no court in the United States has jurisdiction over Matta, and to order his return to Honduras. Petitioner asserts two grounds entitling him to the relief he seeks: First, that the apprehension of Matta violated the Honduran Constitution, which prohibits extradition of Honduran citizens, the 1909 Extradition Treaty between the United States and Honduras, and the Inter-American Extradition Treaty of 1933, to which the United States and Honduras are signatories; Second, that Matta's Fifth Amendment right to due process was violated when he was tortured and abducted from Honduras. Both grounds present questions of jurisdiction and standing.

A. *STANDARD OF REVIEW*

The government asks this Court to determine that, as a matter of law, petitioner is not entitled to the relief he seeks. Under Rule 8(a) of the Rules Governing Habeas Corpus cases under Section 2254, 28 U.S.C. foll. § 2254, the Court may determine, upon review of the expanded record, whether an evidentiary hearing is required. "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." The review, therefore, is in the nature of the review the Court makes when considering a motion for summary judgment.

In *Jeter v. Keohane*, 739 F.2d 257 (7th Cir. 1984), the court stated, "an evidentiary hearing is not necessary when the facts essential to consideration of the constitutional issues are already before the court. *Bergenthal v. Cady*, 466 F.2d 635, 648 (7th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); 28 U.S.C. 2243." 739 F.2d 257, n.1.

The Court must determine if petitioner has presented sufficient allegations to entitle him to the habeas relief he seeks as a matter of law. The Court will, therefore, consider the pleadings and the affidavits in the light most favorable to the petitioner. Petitioner must raise a question of material fact to entitle him

to habeas review; that is, his allegations must be outcome-determinative under the applicable law.

B. *VIOLATION OF EXTRADITION TREATIES*

Matta asserts that his capture violated the Honduran Constitution, and at least two extradition treaties to which the United States and Honduras are signatories.

The well-recognized rule of international law is that "only sovereign nations have the authority to complain about violations of extradition treaties." *United States v. Yunis*, 681 F. Supp. 909, 916 (D.D.C. 1988). Similarly, "[E]xtradition treaties are made for the benefit of the governments concerned .... And, under international law, it is the contracting foreign government, not the defendant, that would have the right to complain about a violation." *United States v. Cordero*, 668 F.2d 32, 37-38 (1st Cir. 1981), *quoted in Yunis*, 681 F.2d at 916. *See also, United States v. Valot*, 625 F.2d 308 (9th Cir. 1980); *United States ex rel Lujan v. Gengler*, 510 F.2d 62, 67-68 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). Further:

> Indeed, even where a treaty provides certain benefits for nationals of a particular state ... it is traditionally held that "any rights arising out of such provisions are under international law those of the states and ... individual rights are only derivative through the states."

Lujan, 510 F.2d at 67, *quoting ALI, Restatement (Second) of the Foreign Relations Law of the United States*, § 115, comment (e) (1965). Therefore, absent an objection by Honduras as to Matta's capture, he is precluded from personally asserting that a violation of any extradition treaty has occurred, whether it be that between the United States and Honduras, or the Inter-American Extradition Treaty.

> It only remains to be emphasized that by no means every irregularity in the recovery of a fugitive from criminal justice is a "recourse to measures in violation

> of international law or international convention." If the State in which the fugitive is found acquiesces or agrees, through its officers or agents, to a surrender accomplished even in the most informal and expeditious way, there is no element of illegality.

Comment to Article 16, Harvard Research in International Law Draft Extradition Treaty, 29 Am. Jur. Int'l Law Supp. 631 (1935); *quoted in Lujan*, 510 F.2d at 67.

As the Second Circuit in *Lujan* noted, in reference to *United States v. Toscanino*, 500 F.2d 267 (2d Cir.) *pet. for reh'g en banc denied*, 504 F.2d 1380 (2d Cir. 1974), "[T]o support this claim [of a violation of an extradition treaty], Toscanino would have to prove that the Uruguayan government registered an official protest with the United States Department of State." 510 F.2d at 67, n.8.

In support of his claim Matta has included in the expanded record an affidavit of Felix Cerna Salgado, a member of the National Congress of the Republic of Honduras for the Department of Olancho. His affidavit states that the apprehension of Matta "has been repudiated by the majority of the Honduran people and especially by public officers of the legislative, judiciary, and executive powers of the Republic. . . ." He further states that Matta's apprehension provoked public demonstrations and an attack on the American Embassy and that five Honduran citizens were killed, six million dollars in property was damaged and a state of national emergency was declared. The affidavit includes an extensive list of public officials and professional organizations that protested the apprehension. However, notably absent is any reference to an official protest having been made by the Honduran government, Foreign Ministry, or President.

Similarly, the "Declaration" submitted by the petitioner, is a declaration or bill merely submitted to the National Congress by seven congressmen. It is of no official weight, the record does not reflect that it has even been voted on, or approved by the congress, and there is no indication that its sentiments have been adopted by the executive branch of the government.

Absent the fact of an official protest, petitioner is without standing to assert the violation of any extradition treaty as grounds for the relief he seeks.

To the extent that Matta's claim is based on the Honduran Constitution, this Court is clearly without jurisdiction to interpret or appy it to proceedings before the Court. Furthermore, the failure of the Honduran government to object to Matta's apprehension similarly prevents him from asserting an infringement of the Honduran Constitution as grounds for the relief he seeks.

C. *VIOLATIONS OF PETITIONER'S FIFTH AMENDMENT RIGHTS*

1. Application of the United States Constitution to Aliens

Petitioner claims that his forcible abduction and transportation from Honduras to the United States violated his right to due process. The Supreme Court has not resolved the question of whether the Constitution of the United States affords its protection to aliens. The Court has, however, held that the Constitution is in force "wherever and whenever the sovereign power of [the United States] is exerted." *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922). Most circuits have applied the Constitution to situations where the government acts extraterritorially, requiring those acts "to conform to constitutional proscriptions when acting overseas." *Yunis*, 681 F. Supp. 917 (citations omitted). This Court is similarly persuaded, and finds that Matta is entitled to the guarantees and protections of the Constitution as it applies to the activities of government officials in Matta's capture and transportation from Honduras to the United States.

2. Whether the circumstances and nature of Matta's capture violated his Fifth Amendment Rights.

The long-standing rule of law is that a forcible abduction does not offend due process nor does it require that courts dismiss an indictment for loss of jurisdiction on those grounds. The Seventh Circuit, in *United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977), stated:

> It has long been held that due process has been satisfied when a person is apprised of the charges against him and is given a fair trial. The power of a court to try a person is not affected by the impropriety of the method used to bring the defendant under the jurisdiction of the court.

Id. at 271, *citing Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886).

The *Ker-Frisbie* doctrine, as it has come to be known, stands for the premise that the "forcible abduction of a criminal defendant into the court's jurisdiction does not impair the court's power to try him." *United States v. Cordero*, 668 F.2d 32, 36 (1st Cir. 1981). This doctrine has been reaffirmed by the Supreme Court in *United States v. Crews*, 445 U.S. 463, 474 (1980); *Stone v. Powell*, 428 U.S. 465 (1976); *Gerstein v. Pugh*, 420 U.S. 103 (1975). (In which the Supreme Court stated "Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction." *Id.* at 119.)

The petitioner is not under indictment in this district. This fact places petitioner's claim in a unique position before the Court. Petitioner seeks relief from this Court which, if granted, would result in his return to Honduras, and, therefore, affect the personal jurisdiction of those courts in which he faces indictment. Under the *Ker-Frisbie* doctrine, courts are not required to dismiss an indictment for lack of jurisdiction based on the defendant's forcible abduction. To the extent that this is a case of first impression, the Court holds that the *Ker-Frisbie* doctrine applies to alleged escapees who seek habeas relief based on the "impropriety of the method" used to bring the petitioner within the jursidiction of the Court. 537 F.2d at 271. To that extent, the Court finds that no Fifth Amendment violation occurred that would warrant the relief Matta seeks.

3. The *Toscinano* Exception

The petitioner would have this Court apply an exception to the *Ker-Frisbie* doctrine pursuant to the Second Circuit ruling in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). The

Court first notes that the Seventh Circuit has yet to apply the *Toscanino* exception to any case before it, nor has the Seventh Circuit indicated any intent to limit the *Ker-Frisbie* doctrine. This Court does not believe that *Toscanino* should be applied to Matta's habeas petition to afford him the extraordinary relief, return to Honduras, which he seeks. To date, the *Toscanino* argument, or one similar, has been rejected by the Fifth, Ninth, Tenth, and Eleventh Circuits. *See: United States v. Postal*, 589 F.2d 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *United States v. Winter*, 509 F.2d 975 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974); *United States v. Cotten*, 471 F.2d 744 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973); *Hobson v. Crouse*, 332 F.2d 561 (10th Cir. 1964); *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S. Ct. 1377 (1987). And no court applying *Toscanino* has dismissed an indictment. In *Marzano*, 537 F.2d at 272, the Seventh Circuit found: "No facts have been alleged or proved which could be termed shocking to the conscience. *Toscanino* is therefore inapposite. We need not decide whether we would follow *Toscanino* if similar facts were presented."

In *Toscanino*, the Second Circuit, determined that the *Ker-Frisbie* doctrine was weakened by the Supreme Court's ruling in *Rochin v. California*, 342 U.S. 165 (1952) (where the court set aside a conviction based on evidence that had been obtained by pumping the defendant's stomach, against his will). The *Toscanino* court stated:

> Faced with a conflict between the two concepts of due process, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the *Ker-Frisbie* version must yield. Accordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's

> deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.

500 F.2d at 275. The allegations were as follows: Toscanino was a citizen of Italy who was lured from his home in Uruguay by a telephone call from a co-conspirator. Toscanino was knocked unconscious with a gun, thrown into the rear seat of a car, bound and blindfolded and driven to the Uruguayan-Brazilian border. He was denied food, water and sleep and was "incessantly tortured and interrogated" for seventeen days. He was forced to walk a hallway for seven or eight hours, and was kicked and beaten. His fingers were pinched with metal pliers, alcohol was flushed in his eyes, and other fluids were forced into his body cavities. He received electric shocks to his ears, toes and genitals. He alleged that agents of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs were present at some of the torture and participated in portions of the interrogation. *Id.* at 269-70.

The Second Circuit remanded the case to the District Court which denied the motion to dismiss, ruling that there was no claim of participation by United States agents in Toscanino's abduction and torture. 398 F. Supp. 916, 917 (E.D. N.Y. 1975). Therefore, the *Toscanino* exception requires that both conditions be met for the court to be divested of jurisdiction. The first is that there must be government participation, and the second is that the government agents' conduct must rise to a level that shocks the conscience of the Court.

The Second Circuit, shortly after *Toscanino*, narrowed its holding, and recognized the vitality of the *Ker-Frisbie* doctrine. In *Lugan v. Gengler*, 510 F.2d 62, the Second Circuit stated:

> Yet in recognizing that *Ker* and *Frisbie* no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct, we did not intend to suggest that any irregularity in the circumstances of the defendant's arrival in the

> jurisdiction would vitiate the proceedings of the criminal court.

Id. at 65 (emphasis supplied). Further:

> We scarcely intend to convey approval of illegal government conduct. But we are forced to recognize that, absent a set of incidents like that in *Toscanino*, not every violation by prosecution or police is so egregious that *Rochin* and its progeny requires nullification of the indictment.

Id. at 66. Therefore, even the circuit that developed the *Toscanino* exception has refused to apply it generally, absent activity that "shocks the conscience."

Even if the *Toscanino* exception were to be applied in the Seventh Circuit, the Court finds that, as a matter of law, the allegations of petitioner do not rise to the threshold standard of *Toscanino*. The allegations of torture do not meet the required level of outrageousness, nor do they shock the conscience to the extend that they would require the Court to afford Matta the relief he seeks, thereby divesting each court under which he is indicted of its jurisdiction over him. *Rosenthal*, 793 F.2d at 1232.

The Court again stresses that Matta is an alleged escapee, under indictment for escaping federal custody. The indictment charging Matta with escape was returned in the Northern District of Florida on December 10, 1986. The Court is unaware of any case applying *Toscanino* to dismiss an indictment or grant habeas relief where an alleged escapee has been returned to the jurisdiction of the court. Furthermore, the Second Circuit, in *United States v. Reed*, 639 F.2d 896 (2d Cir. 1981), drew a distinction between the re-capture of a fugitive from justice and the initial capture of a defendant.

> It should also be noted that the agents' conduct would have been legal had it occurred anywhere in the United States or in any country where the United States exercises extraterritorial jurisdiction; *see* 18 U.S.C. § 3041-3042, for Reed, unlike the defendant

> in *Toscanino*, was a fugitive from justice who had jumped bail, who was the subject of a bench warrant, and who had been sought for some weeks. . . . We do believe, however, **that this case is different from one in which jurisdiction is *initially* obtained by illegal means.**

Id. at 904 n.2 (emphasis added). The *Toscanino* exception is limited, and does not apply to fugitives brought back to the United States to face the charges against them. Therefore, not only do the allegations of torture fail to rise to the level of *Toscanino*, but petitioner is an alleged escapee who is not entitled to review under the *Toscanino* exception. *Id.*

Although, for purposes of review, the Court has construed the petition in the light most favorable to the petitioner, certain allegations are less than credible. Under Fed. R. Civ. P. 56(e), affidavits must be "made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

The Court first notes that parts of Matta's affidavit are less than credible due to his admission that he had a black hood placed over his head throughout the apprehension and drive to the air base. For example, Matta's affidavit states that "one of the agents was seen to carry a briefcase into the house and he knew that they opened it, removed a plastic bag containing a white powder and threw it on the floor," a statement which is not made on his own knowledge. Matta, by his own admission, had a black hood over his head at the time this incident occurred. Similarly, his affidavit states that he was given electric shocks by United States agents, again these incidents occurred while his head was covered. He does not aver that he could see through the hood, nor that the hood was, at anytime, removed from his head prior to his arrival in the United States.

Even if the Court were to accept all of Matta's allegations as true and disregard the affidavits and reports of the government, the treatment he received, even if solely at the hands of United States agents, clearly does not rise to the level of the

"set of incidents" alleged in *Toscanino*. Morever, the medical report of April 6, 1988 fails to support Matta's allegations of torture. Although the Court acknowledges that there is some medical evidence to support Matta's claim that he received shocks from a stun gun, his abrasions were medically classified as "compatible with a ruptured blister." By his own affidavit, Matta's return to the United States took little more than 24 hours. Clearly, his treatment did not rise to the level of torture described in *Toscanino*.

Therefore, the Court, under *Toscanino* would not be required to order Matta returned to Honduras as there has not been an "unreasonable invasion of [Matta's] constitutional rights." *Toscanino*, 500 F.2d at 275. The Court notes that a similar decision was reached by the United States District Court for the Northern District of Florida in a related case. *United States v. Matta-Ballesteros*, slip op. PCA 86-00511-RV (N.D. Fla.) (Aug. 4, 1988). The Court denied Matta's Motion to Dismiss the Indictment, which was also based on the *Toscanino* exception. The court ruled:

> I conclude that the *Toscanino* rationale should not apply under the facts of this case. First, . . . the Supreme Court has implicitly rejected *Toscanino* in decisions subsequent to 1974 which have reaffirmed the *Ker-Frisbie* doctrine.
>
> . . . .
>
> [E]ven if *Toscanino* represented the law, the facts alleged in this case by the defendant do not establish the kind of cruel, barbaric, and outrageous conduct by United States officials needed for the application of the substantive due process prong of the rule.

Id. at pp.9-10.

Under the law, therefore, the Court finds that petitioner's claim fails to raise any issues that would entitle him to an evidentiary hearing. The allegations of the petitioner, the affidavits

and reports, considered in the light most favorable to Matta, conclusively establish that Matta is not entitled to habeas corpus relief. The factual allegations, as a whole, do not allege circumstances of a kind that would require this Court to authorize further discovery or order an evidentiary hearing. *Cf. Machibroda v. United States*, 368 U.S. 487, 494-95 (1962).

While Matta is entitled to all of the substantive and procedural protections of the Constitution that are afforded to all criminals facing trial in the United States, the Court finds that the record shows that no grounds exist which would entitle petitioner to a writ of habeas corpus from this Court. Accordingly, the Court **DENIES** Matta's petition for a writ of habeas corpus, and finds that as a matter of law no hearing is required. This cause of action is hereby **DISMISSED**.

IT IS SO ORDERED.

DATED: 16 August 1988

/s/ _____
DISTRICT JUDGE

eod August 16, 1988 dw

Supreme Court, U.S.
FILED
JUL 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1797

In the Supreme Court of the United States

OCTOBER TERM, 1990

JUAN RAMON MATTA-BALLESTEROS, PETITIONER

v.

GARY L. HENMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under international law and the Due Process Clause, United States courts would be deprived of jurisdiction to try petitioner if his allegations of forcible abduction from Honduras and torture at the hands of United States officials were found to be true.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

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JUAN RAMON MATTA-BALLESTEROS, PETITIONER

v.

GARY L. HENMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 896 F.2d 255. The opinion of the district court (Pet. App. B1-B16) is reported at 697 F. Supp. 1040.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1990. The petition for a writ of certiorari was filed on May 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sought a writ of habeas corpus in the United States District Court for the Southern District of Illinois, claiming that the government had illegally kidnapped him from his home in Honduras and tortured him before transporting him to the United States to face trial on pending criminal charges. The district court denied that motion without a hearing. Pet. App. B1-B16. The court of appeals affirmed. *Id.* at A1-A19.

1. The pertinent facts are summarized in the opinion of the court of appeals. Pet. App. A2-A4.[1] In 1971, petitioner, a Honduran citizen, escaped from the United States Prison Camp at Eglin Air Force Base in Florida and fled to Honduras. While in Honduras, he allegedly became heavily involved in the international narcotics trade. *Id.* at A2.

On the morning of April 5, 1988, petitioner, accompanied by his bodyguards, arrived at his home in Tegucigalpa, Honduras. On his arrival, he was surrounded by armed members of the Honduran Special Troops, who were joined by at least four United States Marshals. Allegedly at the direction of the Marshals, the troops arrested and handcuffed petitioner. A black hood was placed over his head and he was pushed onto the floor of a car driven by a Marshal. Pet. App. A2-A3.

The Marshals immediately took petitioner to a United States Air Force base approximately one-and-one-half hours away. According to his allegations, petitioner was severely beaten and burned with

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[1] Since the district court denied petitioner discovery and an evidentiary hearing, the court of appeals considered the facts alleged in the pleadings and affidavits in the light most favorable to petitioner. Pet. App. A2 n.1.

a "stun gun" during the ride, all at the direction of the Marshals.[2] After arriving at the base, petitioner was flown to the United States. During the flight, petitioner claims, the Marshals beat him and shocked him about the body, including on his testicles and feet. Pet. App. A3.

Upon his arrival in the United States, petitioner was immediately transferred to Marion Penitentiary. By that time, approximately 24 hours had passed since his apprehension. A physician examined petitioner and found abrasions on his head, face, scalp, neck, arms, feet, and penis, as well as blistering on his back. According to the physician, those injuries could have been caused by a stun gun. Pet. App. A3.

2. Thereafter, petitioner filed a petition for a writ of habeas corpus in the Southern District of Illinois, where Marion Penitentiary is located. Petitioner claimed that his apprehension violated the Honduran Constitution, international law, and the Due Process Clause of the United States Constitution. Asserting that the United States courts lacked jurisdiction to try him, petitioner demanded that he be released and returned to Honduras. Pet. App. A3.

At the time he sought the writ, petitioner was under indictment in the Northern District of Florida for escape, and in the Central and Southern Districts of California and the District of Arizona for various narcotics offenses. After filing the petition, he sought a preliminary injunction to prevent the government from transferring him to face prosecution in those

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[2] A "stun gun" is a non-lethal device often used to subdue individuals resisting arrest. It sends an electric pulse through the body of the victim causing immobilization, disorientation, loss of balance, and weakness. It leaves few, if any, marks on the body of the victim. Pet. App. A3 n.2.

districts. The district court denied the request for a preliminary injunction, concluding that petitioner had failed to establish that he had no adequate remedy at law or to show irreparable harm. *Matta-Ballesteros ex rel. Stolar* v. *Henman*, 697 F. Supp. 1036 (S.D. Ill. 1988). Pet. App. A3-A4.

3. After denying the preliminary injunction, the district court ordered an expanded record from the parties, including affidavits from petitioner and any witnesses. Based on the expanded record, the district court held that, even accepting the allegations about his arrest and rendition, petitioner was not entitled to the relief he sought. Pet. App. B1-B16. The court explained that petitioner lacked standing to seek relief based on international law or the Honduran Constitution (*id.* at B7-B9); that the Fifth Amendment does not divest a district court of jurisdiction over a fugitive, such as petitioner, based on allegations of torture in the arresting process (*id.* at B9-B10); and that even if a court could lose jurisdiction on that basis, petitioner's allegations did not rise to a "level of outrageousness" that would require such a result (*id.* at B13). Following the district court's denial of the writ, petitioner was transferred to a prison in Florida, and has since been convicted on the escape charge. *Id.* at A4.[3]

---

[3] Prior to trial, the district court in Florida heard arguments similar to those presented here and decided that the United States had jurisdiction over petitioner. *United States* v. *Matta-Ballesteros*, 700 F. Supp. 528 (N.D. Fla. 1988). That decision has been appealed to the Eleventh Circuit. Petitioner has also raised the same claims before a district court in the Ninth Circuit. That court held that petitioner was collaterally estopped from litigating those claims because they had been fully and fairly litigated before the district court in the present case. Pet. App. A4-A5 n.3.

4. The court of appeals affirmed, concluding that petitioner's claims failed as a matter of law. Pet. App. A1-A19. The court first rejected the contention that petitioner's arrest violated the Honduran Constitution and two extradition treaties to which the United States and Honduras are parties. *Id.* at A9-A10. The court explained that "individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved." *Id.* at A9. Since the government of Honduras had registered no protest in the case, the court concluded that petitioner could not invoke principles of international law in challenging his prosecution.

The court of appeals next rejected petitioner's claim that his release was required by the Due Process Clause. Relying on this Court's decisions in *Ker* v. *Illinois*, 119 U.S. 436 (1886), and *Frisbie* v. *Collins*, 342 U.S. 519 (1952), the court of appeals explained that a court is not divested of power to try a person because of the means by which that person was brought within the court's jurisdiction. Pet. App. A10. The court also declined (*id.* at A16) to follow the Second Circuit's decision in *United States* v. *Toscanino*, 500 F.2d 267 (1974), where that court fashioned an exception to the *Ker-Frisbie* doctrine for cases involving "torture, brutality and similar outrageous conduct." Pet. App. A12.

Judge Will concurred. Pet. App. A17-A19. Instead of rejecting *Toscanino*, as the majority had done, Judge Will distinguished it on two grounds: first, "the torture Toscanino alleged was grossly more egregious than what [petitioner] alleges"; and second, unlike Toscanino, petitioner was a fugitive at the time of his abduction, and "release would

mean effectively commuting his earlier, lawfully imposed sentence." *Id.* at A17.

ARGUMENT

Petitioner contends that the district court lacks jurisdiction over him because of the circumstances surrounding his arrest. Petitioner invokes principles of international law, including two extradition treaties, as well as the Due Process Clause of the Fifth Amendment.

1. Petitioner cannot challenge his prosecution on the basis of international law. International agreements generally do not create private rights. See *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Dreyfus* v. *Von Finck*, 534 F.2d 24, 29 (2d Cir.), cert. denied, 429 U.S. 835 (1976); 2 Restatement (Third) of the Foreign Relations Law of the United States § 907, comment a (1987). Rather, treaties typically are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress." *United States* v. *Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988). See also *United States* v. *Davis*, 767 F.2d 1025, 1030 (2d Cir. 1985); *United States* v. *Cadena*, 585 F.2d 1252, 1260-1261 (5th Cir. 1978); *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 67 (2d Cir.), cert. denied, 421 U.S. 1001 (1975).

As this Court explained more than a century ago,

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the

> honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598 (1884). A treaty may, of course, contain provisions that create rights in individuals that are enforceable in the courts of one or both parties to the agreement, but even treaties that ultimately benefit individual interests ordinarily do not give individuals justiciable legal rights. 1 Restatement (Third) of the Foreign Relations Law of the United States § 111, reporters' note 4, at 53 (1987).

In determining whether a treaty creates enforceable rights for individuals, courts look principally to the intent of the parties to the agreement as it is reflected in the language of the treaty. *United States* v. *Postal*, 589 F.2d 862, 876 (5th Cir.), cert. denied, 444 U.S. 832 (1979). Treaties that set forth principles by which nations agree to abide in dealing with one another are not construed as addressed to the judicial branch or to create enforceable rights. 589 F.2d at 878; *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985) (treaty phrased in "broad generalities" constitutes a "declaration[] of principles, not a code of legal rights" and does not "create a judicially-enforceable right"); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d at 809-810 (Bork, J., concurring); *Diggs* v. *Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (treaty provisions in question "were not addressed to the judicial branch of our government"; "[t]hey do not by their

terms confer rights upon individual citizens; they call upon governments to take certain actions"). Only if the treaty "prescribe[s] a rule by which the rights of the private citizen or subject may be determined" will it be construed to create enforceable rights. *Head Money Cases*, 112 U.S. at 598-599.

Extradition treaties, in particular, are addressed to the mutual obligations of the contracting States; they are not made for the benefit of individuals who may be subject to their jurisdiction. See *United States* v. *Cordero*, 668 F.2d 32, 37-38 (1st Cir. 1981); *United States* v. *Valot*, 625 F.2d 308, 310 (9th Cir. 1980); *United States ex rel. Lujan* v. *Gengler*, 510 F.2d at 66-68. Accordingly, "[i]f the State in which [a] fugitive is found acquiesces or agrees, through its officers or agents, to a surrender accomplished even in the most informal and expeditious way, there is no element of illegality." *Id.* at 67. This is "no more than a particular application of the general principle that consent or acquiescence by the offended state waives any right it possessed, and heals any violation of international law." *Ibid.*

Petitioner does not claim that the government of Honduras made any official protest in this case. To the contrary, petitioner admits that the Honduran military cooperated in his arrest. In these circumstances, the court of appeals correctly concluded that "[petitioner's] claims of violations of international law do not entitle him to relief." Pet. App. A10.

Petitioner contends (Pet. 10), however, that this Court's decisions in *United States* v. *Rauscher*, 119 U.S. 407 (1886), *Ford* v. *United States*, 273 U.S. 593 (1927), and *Cook* v. *United States*, 288 U.S. 102 (1933), prohibit the United States from prosecuting a defendant who has been rendered for trial in violation of a treaty, even if the foreign government has

not lodged a protest. Those decisions do not support that proposition. In *Rauscher*, which involved formal extradition proceedings, the Court held only that a defendant may not be prosecuted for an offense other than one for which he was extradited. Nothing in *Rauscher* suggests that the parties to an extradition treaty may not waive the treaty's provisions. The *Cook* and *Ford* cases concerned a self-executing treaty, which, in light of its language and surrounding circumstances, the Court construed as specifically forbidding certain seizures on the high seas and granting enforceable rights to individuals not to be prosecuted if they were seized in violation of the treaty. Those cases "stand for the proposition that self-executing treaties may act to deprive the United States, and hence its courts, of jurisdiction over property and individuals that would otherwise be subject to that jurisdiction." *Postal*, 589 F.2d at 875. See also *Cordero*, 668 F.2d at 38.

Petitioner does not suggest that the treaties on which he relies are self-executing, that is, that they explicitly granted him an enforceable right not to be prosecuted. See *Cordero*, 668 F.2d at 38; *Postal*, 589 F.2d at 875. Instead, he simply quotes (Pet. 13 n.7) the statement from the opinion in *Ford* that *Ker* was inapplicable because "a treaty of the United States is directly involved." 273 U.S. at 605-606. The Court in *Ford* plainly did not mean to suggest that the principles of the *Ker* case are inapplicable any time a defendant invokes a treaty in objecting to a court's jurisdiction over him, since *Ker* itself involved an alleged violation of a treaty. The Court in *Ker* noted that the treaty in that case conferred no legal right on the defendant to object to the court's jurisdiction over him. By its cryptic reference to the "direct[] involve[ment]" of a treaty, the Court in

Ford appears to have meant that *Ker* is inapplicable in the face of a treaty, such as the one at issue in *Ford*, that grants the defendant the right not to be prosecuted if he is taken into custody in derogation of the provisions of the treaty. Nothing in the Court's opinion in *Ford* suggests that *Ker* is inapplicable where the treaty at issue is not "directly involved"—that is, where the treaty does not grant the defendant the right not to be prosecuted.[4]

This interpretation of *Ford* was confirmed by the Court's subsequent decision in *Cook* v. *United States*, *supra*. In that case, the Court held that the principles of *Ker* do not apply where a treaty between the United States and another nation expressly addresses the authority of the United States to arrest and try the citizens of the contracting nation, and precludes arrest and prosecution except according to its terms. As the Court explained, the treaty at issue in both *Ford* and *Cook* expressly addressed the right of the United States to seize and take vessels " 'into a port of the United States, its territories or possessions *for adjudication* in accordance with' the applicable laws." 288 U.S. at 121 (emphasis added). The treaty thus explicitly addressed and granted an immunity from "adjudication" where its terms were violated. For that reason, the Court concluded that "[t]o hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty." *Id.* at 121-122.

The two extradition treaties on which petitioner relies do not at all resemble the treaty at issue in *Ford* and *Cook*. The extradition treaties deal with

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[4] Indeed, the Court in *Ford* expressly rejected the proposition that an international treaty could confer immunity from prosecution on a defendant by implication. 273 U.S. at 611.

the mutual obligations of the contracting States to produce individuals in response to demands for their surrender. The treaties do not explicitly or even by implication bar a contracting State from trying a defendant if that State obtains custody of the defendant other than through the processes established by the treaties. Petitioner does not point to any authority for the "novel" proposition that extradition treaties "*forbid* foreign nations to return criminal defendants except in accordance with the formal procedures they contain." *Cordero*, 668 F.2d at 38. Indeed, in *Ker* v. *Illinois*, *supra*, decided the same day as *Rauscher*, this Court held just the opposite: that Ker's alleged abduction from Peru by an official of the United States government would not bar his prosecution in the Illinois courts, even though there was an extradition treaty in effect between Peru and the United States at the time, and even though the provisions of the treaty were not followed in Ker's case. See *United States* v. *Valot*, 625 F.2d 308, 310 (9th Cir. 1980).[5]

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[5] Petitioner also argues that his abduction from Honduras violated Article 102 of the Honduran Constitution, which provides that "[n]o Honduran citizen may be extradited nor turned over to the authorities of a foreign state." Pet. 4. Petitioner does not explain, however, why the Honduran Constitution has any force in the courts of the United States. The applicability of the Honduran Constitution is particularly improbable in light of the Honduran government's failure to protest petitioner's rendition. To the extent that petitioner suggests that Article 102 of the Honduran Constitution creates enforceable rights in United States courts because it is somehow incorporated in the two extradition treaties on which he relies, he is mistaken. The two treaties merely reserve the right to each contracting State not to be bound to deliver up its own citizens; the treaties do not impose an obligation on each contracting State not to request the de-

2. Nor does the Due Process Clause deprive the United States of jurisdiction to try petitioner. Following the decisions in *Ker* v. *Illinois*, *supra*, and *Frisbie* v. *Collins*, 342 U.S. 519 (1952), this Court has consistently held that the manner in which a defendant is brought within the jurisdiction of the court does not affect the ability of the United States to prosecute him. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred"); *United States* v. *Crews*, 445 U.S. 463, 474 (1980) ("Respondent is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt"); *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975) (pretrial detention in violation of the Fourth Amendment cannot justify immunity from prosecution for the prisoner).

In an attempt to circumvent the *Ker-Frisbie* doctrine, petitioner relies on *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974). In that case, Toscanino challenged the authority of the court to try him, contending that his presence had been obtained

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livery of nationals of the other State or not to deliver their own nationals on request, and they certainly do not give the individuals any right not to be prosecuted when one State obtains custody of them with the permission, acquiescence, or assistance of the other State. See Extradition Convention, Jan. 15, 1909, United States-Honduras, art. VIII, 37 Stat. 1621, T.S. No. 569, at 895; Extradition Convention, Dec. 26, 1933, United States-American Republics, art. 2, 49 Stat. 3114, T.S. No. 882, at 154.

through kidnapping and torture. Toscanino offered to prove that he and his pregnant wife had been lured from their home in Montevideo, Uruguay, and that he was then knocked unconscious, placed in a car, bound and blindfolded, and driven across the border to Brazil. Once there, Toscanino alleged, he was interrogated for 17 days, intravenously fed at only a sustenance level, deprived of sleep, kicked and beaten, and made to walk the halls of his place of detention for seven or eight hours at a time. He further claimed that pliers were used on his fingers and that electrodes were attached to his earlobes, toes, and genitals and used to send jolts of electricity throughout his body. Toscanino claimed that a member of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice was present throughout the brutal interrogation and that the United States Attorney was aware of and authorized all of these actions. Finally, Toscanino claimed that he was drugged by American agents and placed aboard an airliner destined for the United States. *Id.* at 269-270.

The Second Circuit held that the *Ker-Frisbie* doctrine would not apply to Toscanino's arrest and interrogation if the facts he alleged proved to be true. In the Second Circuit's view, the *Ker-Frisbie* doctrine had been substantially undermined by two developments in this Court's jurisprudence. First, in *Rochin* v. *California*, 342 U.S. 165 (1952), this Court held that the Due Process Clause prevented the use of evidence that was obtained by methods contrary to "canons of decency and fairness which express the notions of justice of English-speaking peoples," or conduct "that shocks the conscience." *Id.* at 169, 172. Second, in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the Court held that evidence seized in violation of the

Fourth Amendment was inadmissible in state criminal prosecutions. In the Second Circuit's view, this "erosion of *Frisbie*" was sufficient to suggest that it should be distinguished in a case like Toscanino's. 500 F.2d at 273.

Even in the Second Circuit, the *Toscanino* case lacks significant vitality. In *United States ex rel. Lujan* v. *Gengler*, *supra*, that court construed *Toscanino* as applying only where the defendant could prove "torture, brutality and similar outrageous conduct." 510 F.2d at 65. And to our knowledge, no court—including the *Toscanino* court, which remanded the case for factual findings—has ever required the United States to divest itself of jurisdiction because of the manner in which the defendant's presence was obtained. See also *United States* v. *Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984) ("the continuing validity of the *Toscanino* approach is questionable"), cert. denied, 471 U.S. 1100 (1985).[6]

In any event, *Toscanino* is easily distinguishable from the present case. Unlike Toscanino—who alleged that his *initial* arrest was unlawful—petitioner was a fugitive from justice at the time of his arrest, having escaped from a federal prison in Florida. As Judge Will noted in his separate opinion, releasing petitioner would therefore "mean effectively commuting his earlier, lawfully imposed sentence." Pet. App. A17. See *United States* v. *Reed*, 639 F.2d 896,

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[6] Both petitioner (Pet. 9, 14) and the court of appeals (Pet. App. A12) state that the Ninth Circuit has followed *Toscanino*. In fact, however, the Ninth Circuit has not considered a case in which a showing similar to that in *Toscanino* has been made; accordingly, that circuit has yet to address the issue on the merits. See *United States* v. *Fielding*, 645 F.2d 719, 723 (9th Cir. 1981) ("The Ninth Circuit has not had occasion to apply the *Toscanino* rule").

902 n.2 (2d Cir. 1981) (distinguishing *Toscanino* on the ground that "Reed, unlike the defendant in *Toscanino*, was a fugitive from justice who had jumped bail, who was the subject of a bench warrant, and who had been sought for some weeks"). Moreover, as the district court found, petitioner's allegations of misconduct, even if true, "do not meet the required level of outrageousness, nor do they shock the conscience to the exten[t] that they would require the Court to afford [petitioner] the relief he seeks." Pet. App. B13. Accord *id.* at A17 ("the torture Toscanino alleged was grossly more egregious than what [petitioner] alleges").[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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JULY 1990

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[7] Finally, petitioner contends (Pet. 12) that this Court should bar his prosecution under its supervisory power. Petitioner failed to make that argument in the court of appeals, however, and has therefore waived it. In any event, "[t]he values assigned to the competing interests do not change because a court has elected to analyze [a] question under the supervisory power instead of [the Constitution]." *United States* v. *Payner*, 447 U.S. 727, 736 (1980).

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